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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 195

FRED DELUCIA and SALVATOR MONTELLA,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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The New York Courts have deprived petitioners of due process of law by upholding the convictions although it indisputably appeared that several jurors without authority or permission of the Court or counsel visited the scene of the crime, and re-enacted the scene of the crime and reported back to the jurors the results of their observations which later became the basis for the finding of guilt	10
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No. .....

FRED DELUCIA and SALVATOR MONTELLA,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on March 18, 1965, 15 N. Y. 2d 294.

A. Opinions Below

An opinion was rendered by the Trial Court, which opinion is annexed to the petition as Appendix A. Said opinion is not officially reported.

On appeal to the Appellate Division of the Supreme Court in and for the Second Judicial Department in the State of New York the judgment and order appealed from were affirmed without opinion (21 A. D. 2d 805).

Upon appeal to the Court of Appeals of the State of New York the judgment of the Appellate Division was affirmed by a divided Court, four (4) Judges voting to affirm the judgment and order below and three (3) Judges dissenting. Said opinion is reported at 15 N. Y. 2d 294. Copies thereof are attached to this petition as Appendix B.

There were no other opinions written in connection with the case.

B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U. S. Code §1257 (3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York (15 N. Y. 2d 294) made on March 18th, 1965 as aforesaid, and annexed hereto as Appendix E.

C. The Questions Presented for Review

1) Were petitioners deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they were deprived of a basic protective right to a fair trial where several jurors, in contravention of the New York State Code of Criminal Pro-

cedure, and acting without the knowledge or authority of the Court or counsel, went to the alleged scene of the crime, investigated there to check on the arresting officers' testimony, and reported their findings to the fellow members of the jury?

2) Were petitioners deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they were deprived of the basic protective right to a fair trial by being denied a hearing as to the alleged misconduct by the jurors who in contravention of the New York State Code of Criminal Procedure, and acting without the knowledge or authority of the Court or counsel, went to the alleged scene of the crime, investigated there to check on the arresting officers' testimony, and reported their findings to the fellow members of the jury?

D. Constitutional Provision and Statute Involved

The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution. The statutes involved are §465 and §411 of the Code of Criminal Procedure of the State of New York.

Each of the foregoing is set forth verbatim in Appendices C and D respectively of this petition.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioners were indicted by a Grand Jury in Kings County in the State of New York for the crimes of at-

tempted burglary in the third degree and possession of burglars' instruments. They were tried in the Supreme Court of the State of New York, Queens County, upon said indictment before Honorable Peter T. Farrell, a Justice of said Court and a jury. They were convicted as charged in the indictment by verdict of the jury after trial.

Following the verdict of the jury, trial counsel for the petitioners had occasion to speak to several of the jurors as they were leaving the courthouse, at which time he learned from them that several of the jurors had visited the scene of the crime the night before the case was submitted to them for deliberation. This visit to the scene was without knowledge or authority of the Court or counsel and in contravention of the Code of Criminal Procedure of the State of New York.

It was further learned that the purpose for this visit was because certain testimony and evidence relating to the physical layout of the scene of the crime was not clear to the jurors. It was further learned that those members of the jury who visited the scene re-enacted the crime as described by the prosecution's witnesses in order to clarify what was otherwise an unsatisfactory state of the evidence at the trial.

The conversation thus had and the facts thus learned were embodied in affidavits by the trial counsel who had spoken with the jurors, and were made the subject of a motion to set aside the verdict. The motion was brought on for argument prior to sentence. The motion was denied on June 12th, 1963 by Mr. Justice Farrell in an opinion which is appended hereto as Appendix A.

In essence, the motion was denied upon three (3) grounds:

1) The moving papers failed to establish facts showing that the unauthorized visit to the scene prejudiced the defendants' rights;

2) That the jurors cannot, by subsequent evidence, impeach their own verdict;

3) That the affidavits were based upon hearsay statements.

Sixteen (16) days later the Court sentenced petitioners to a term aggregating three and one-half (3½) to ten (10) years as to petitioner DeLucia and to a prison term aggregating two and one-half (2½) years to five (5) years as to petitioner Montella.

An appeal was then taken to the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department.

While said appeal was pending petitioners engaged an investigator who interviewed five of the twelve jurors in the case and obtained statements from them as to what had transpired with respect to the unauthorized visit to the alleged scene of the crime. Based upon these statements, the details of which are hereinafter set forth, petitioners made a further motion in the Trial Court for a rehearing and reargument of the prior motion for a new trial.

On February 13, 1964, Mr. Justice Farrell denied that portion of the motion which requested a rehearing and granted the motion to reargue, but upon said reargument adhered to his original decision and order on June 13, 1963. This motion and order was made part of the record

on appeal. Again, the requested hearing into the facts was denied.

It was the theory of this second motion that the additional statements secured by the investigator established that the activities and misconduct of the jurors had prejudiced petitioners by depriving them of a fair trial.

These statements demonstrated, *inter alia,* that five (5) jurors changed their opinion from "not guilty" to "guilty" as a result of what the jurors who visited the scene reported back to them. They also demonstrated that the visit to the scene was prompted by difficulties which the jurors had with respect to the physical layout of the premises regarding which there had been much testimony at the trial, including the introduction of photographs which apparently caused difficulties to the jurors as well.

At no time did the prosecution offer any evidence to contradict the truth of any of the assertions made with respect to the jurors' blatant misconduct.

As previously indicated the Appellate Division affirmed the convictions without opinion. The Court of Appeals of the State of New York affirmed the convictions by a closely divided Court, with opinions written by the majority of the Court and by the dissenting Judges.

The testimony upon the trial of the case was essentially as follows:

The prosecution's case was based essentially by the testimony of two detectives, Joseph Szarwas and Francis J. Goggin, and a police lieutenant, Edwin J. Lester.

Szarwas testified that he observed petitioners enter an alleyway adjacent to a cabaret on Queens Boulevard known

as "Pep" McGuire's. The cabaret was located on the ground floor of a building which also contained apartments above. Szarwas saw petitioners open a door from the alleyway and enter the building into a hallway leading to the apartments above the cabaret. He saw DeLucia near a glass panel near that door. He directed DeLucia to remain there and then proceeded three or four steps up to a landing where he observed Montella holding a screwdriver which was wedged between the door and its frame. This door was a door leading into the cabaret portion of the building.

This was the essence of the prosecutor's case.

Petitioner Montella testified as a witness in his own behalf. He is 33 years of age, married, and the father of four children with whom he resides. He had never been convicted of a crime.

After describing the earlier events of the evening, he testified that he and DeLucia started to walk through the alley toward their car which was on the street at the other end of the alley when they were approached by the two detectives who came at them with drawn guns and told them to put their hands up. The detectives pushed them into the vestibule. When Montella inquired what the cause of this was, he was told to shut up and pick up a screwdriver which was lying on the floor. He denied having otherwise held the screwdriver which the police officer said he had in his hand when it was wedged into the door frame. He denied attempting to burglarize the premises.

Petitioner DeLucia did not take the witness stand.

F. The Stages of the Proceedings in Which the Issues Involved Were Raised and the Manner in Which They Were Raised

The Federal issues presented herein were raised at the first available opportunity, namely, when the facts as to the jurors' visit to the scene were learned immediately following their verdict. They were raised by motion to set aside that verdict which motion as previously indicated was made prior to sentence. The supporting affidavit made by trial counsel, James F. McArdle, Esq., contained the following statement:

> "Deponent wishes to state categorically that there is no question in his mind that these jurors acted with the highest motives, but respectfully urges to the Court that their action, no matter how well motivated, and no matter how well directed or intentioned, brought into their province, matters which were extraneous in their purview as it should have been controlled by the evidence elicted in open Court and in the presence of the defendants and their counsel, and indeed carelessly disregarded the continued and well directed instruction of the Court during the trial that they were not to discuss the matters before them in any particular; that they were to form no opinion on the guilt or innocence of the defendants; that they were only to consider the evidence that was lawfully before them as indicated by the Court's rulings, and that their failure in these regards violated the rights of the defendants herein however innocent the intention of the jurors, and prevented them from obtaining the fair and due consideration of the case and denied to the defendants

their right to due process in protection of the law guaranteed to them by the State and Federal Constitutions."

These issues were passed upon by the Court as previously set forth in Paragraph "E" of this petition.

The same issues were the main thrusts of the appeals to the Appellate Division and to the Court of Appeals.

Indeed both the majority and the dissenting opinions in the Court of Appeals dealt at great length with these issues. Illustrative is the opening statement in the dissenting opinion by Chief Judge Desmond:

> "The catch-phrase 'jurors may not impeach their verdict' does not dispose of the proof that these jurors, depriving defendant of a basic protective right, went on their own to the crime scene, investigated these to check on the officers' testimony and reported back to their fellow members of the jury, all without the knowledge of Court or counsel. The rule prohibiting self-impeachment by jurors is stretched too far and in the wrong direction when it is used to validate such a transgression of fundamental fair trial rules."

G. Argument Amplifying the Reasons Relied on for Allowance of the Writ

POINT ONE

The New York Courts have deprived petitioners of due process of law by upholding the convictions although it indisputably appeared that several jurors, without authority or permission of the Court or counsel, visited the scene of the crime, and reenacted the scene of the crime and reported back to the jurors the results of their observations which later became the basis for the finding of guilt.

The jury returned a verdict of guilty as charged against both appellants. Unbeknownst to appellants or their counsel several of the jurors had, without permission of the Court, visited the premises in question during the trial. They there re-enacted the version of the alleged crime as testified to by the People's witnesses. This *ex parte* investigation by the jurors formed the basis of their verdict against appellants. That the verdict was influenced by this action is apparent from their written statements. One of the jurors,* Mr. Kushner, particularly stated, in part as follows:

> " . . . I do recall that it was Mrs. Margolin who had instigated the fact that the jurors should go to the scene of this crime to get a better picture of what had actually happened and to better assure herself in the interpretation of the photos and other evidence which had been presented by the district attorney's of-

* The detailed statements of five of the jurors are annexed to the motion for rehearing and reargument dated January 29, 1964.

fice. I further recall that it was Mrs. Margolin who after visiting the scene came back to the jury room the next day and attempted to influence others as to the guilt of the boys. At this time, she also had stated that she was convinced that persons of this type should be removed from the street, since her husband had been a victim of a recent mugging. *As the result of her carrying on she most certainly had influenced at least five of the jurors, who at the time were for voting that these two young men were innocent.* She, Mrs. Margolin, had stated that she had re-enacted how these two defendants could have been apprehended. In her discussing how she had visited this scene, *I would say that she definitely swayed the other five jurors, who took her word as an authority, since she had taken the time to go to the scene.*"

The signed statements taken from some of the jurors and made part of the Record clearly demonstrate that the view of the premises, taken the night before the case was submitted to them for deliberation, was more than a cursory visualization of the premises. It was an extensive *ex parte* investigation coupled with a detailed re-enactment of the alleged crime as described by the prosecution's witnesses. Its avowed purpose, to use the language of one of the jurors, a Mr. LeBris* was as follows:

"I was one of the jurors, in company with a Mr. Johnson, a fellow juror, who took it upon ourselves to visit the outside area where the police had apprehended

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*Please see statement of Mr. LeBris annexed to motion of January 29, 1964.

> the two defendants on trial in this criminal case. We visited this scene because, a number of things that had been mentioned in the trial had not been specifically clear to us, and as a result of this visit, some of the testimony now became more clear. This visit, I believe, helped me clarify some puzzling aspects of testimony, given, and as a result it helped influence me when we adjourned to the jury room in coming to my decision."

Its undeniable result was a verdict of guilty based not on the evidence, but on the unlawful, unilateral inquiry carried out by the jury in direct violation of the Court's admonitions. Nor was the verdict reached without regard to the efforts of the self-appointed subcommittee of the jury. To the contrary, at least five jurors who, upon the lawful evidence, "were for voting that these two young men were innocent" were improperly influenced to revise their positions and vote for convictions.*

At no time did the prosecution dispute the truth of any of the assertions made with respect to the jurors' concededly unlawful conduct. The prejudicial effect upon the jurors resulting from their clandestine investigation is amply demonstrated by their uncontroverted statements. The evidence received in Court during the trial obviously left at least some of them unsatisfied. In their misguided zeal to find what they hoped would be the truth of the matter, they ran haphazardly along a path forbidden by long established and wisely chosen rules of law. The end product was not a verdict consonant with our jurisprudence.

The trial court might properly have been reluctant upon the original motion, to set aside the verdict merely upon

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* Statement of Mr. N. Kushner, Juror #6.

the affidavit of defense counsel. Nonetheless, the matter was not one to be summarily dismissed. Defense counsel was a reputable officer of the Court. His affidavit was sufficient to alert the Court to a substantial and uncontradicted defect in the proceedings. Factual and legal issues were blatantly obvious. *At the very least, a hearing should have been ordered and testimony taken.* This refusal alone was error.

At all events, the subsequent motion for a rehearing and a reargument specifically requested the taking of testimony. There was presented to the Court unequivocal and again uncontroverted statements by several jurors attesting to the clandestine inspection of the premises and its prejudicial effect in persuading at least five jurors to change their vote from not guilty to guilty. Again, the trial court refused to inquire further into the matter. At this stage there was more than enough to warrant a hearing into the matter. There was enough to vitiate the entire verdict.

It was urged by the prosecution and concurred in by the majority of the Court below, that to inquire into the matter would result in the jurors impeaching their own verdict. Such an approach misapprehended the nature of the relief sought and the concept of impeachment of a verdict. It is, of course, true beyond the need of citation that, generally speaking, jurors may not impeach their own verdict. The facts elicited at bar, however, did not turn upon the jurors' deliberations, but to their misconduct *prior to deliberation, viz.*, their visit to the scene the night before deliberation began, their re-enactment of the alleged crime at that time, and their conversations and discussions at that time, all in violation of the Court's admonition. Their statements in

that regard would not be for the purpose of impeaching their verdict, but to establish that *prior to commencing their deliberations,* they had disqualified themselves from acting as jurors, because they could no longer act in accordance with the law and their oaths as jurors.

Although the issue of jurors' misconduct prior to commencement of their deliberations does not appear to have been the subject matter of prior decisions in this Court, we believe that conduct of the type concededly disclosed by this Record is disconsonant with due process of law as settled in our jurisprudence.

We believe further, that the language of Chief Judge Desmond, speaking for the minority in the Court of Appeals, sets forth what is or should be the law of our land:

> "The catch-phrase 'jurors may not impeach their verdict' does not dispose of the proof that these jurors, depriving defendant of a basic protective right, went on their own to the crime scene, investigated there to check on the officers' testimony and reported back to their fellow members of the jury, all without the knowledge of court or counsel. The rule prohibiting self-impeachment by jurors is stretched too far and in the wrong direction when it is used to validate such a transgression of fundamental fair trial rules."
>
> • • • • •
>
> "Without destroying the rule where it properly applies we should hold that it does not apply to a situation like this where the investigation is not as to what happened in the jury room or why, but as to a fact (illegal view)

which has always been considered to be a strong ground for setting aside a verdict (See Code Crim. Pro., §465, *supra; People* v. *Gallo,* 149 N. Y. 106, 114 et seq.)."

It is undoubtedly a frequent temptation, if not actual occurrence, for well-meaning jurors, in an effort to ascertain what they regard to be the truth, to undertake clearly improper conduct such as this. Indeed, the result of such conduct is that the jurors become *ex officio,* albeit undisclosed and misguided, witnesses in the case regarding which a defendant is unjustifiably and improperly deprived of the right of confrontation. This Court, as recently as April 5, 1965, has held that confrontation is a fundamental right which is essential to a fair trial in a criminal prosecution under the Fourteenth Amendment via the Sixth Amendment. *Pointer* v. *Texas,* 85 S. Ct. 1065; *Douglas* v. *Alabama,* 85 S. Ct. 1074.

In view of these circumstances, we respectfully urge that the issues presented by this case are matters of sufficient importance to the administration of the criminal law to warrant the granting of the petition prayed for.

CONCLUSION

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioners

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Member of the Bar of the
Supreme Court of the
United States
Of Counsel

APPENDIX A

Opinion of the Trial Justice

SUPREME COURT

QUEENS COUNTY

CRIMINAL TERM, PART I

By

PETER T. FARRELL, *J.*

Dated June 13th, 1963

122–63 superseding Ind. No. 878–62

THE PEOPLE OF THE STATE OF NEW YORK

—against—

FRED DE LUCIA
SALVATORE MONTELLA

Defendants.

This is a motion by the defendants for an order setting aside the verdict of guilty and granting a new trial to the defendants upon the ground that the jury violated Sec. 465, subd. 2 and 3, of the Code of Criminal Procedure.

Defendants were convicted on May 2, 1963 by the verdict of a jury of the crimes of Attempted Burglary in the Third Degree and Possession of Burglars Instruments as a Felony as to DeLucia, and Attempted Burglary in the Third Degree and Possession of Burglars Instruments as a Misdemeanor as to Montella.

The defendants allege, in substance, that during the trial and without direction of the Court, pursuant to Sec. 411 of the Code of Criminal Procedure, the jury visited the scene of the alleged crime and conducted thereat their own experiments in receiving and evaluating evidence.

Defendants by their affidavits submitted in support of this motion and by oral argument in open Court base their allegations only upon information and statements of jurors who rendered judgment in this matter.

It is well established law that the fact that the jury made an unauthorized visit to the place of the crime will not require a new trial, if they were not guilty of misconduct while there, and could not have acquired any improper information that might have influenced their verdict. (24 C. J. S. Criminal Law, Sec. 1449(14) p. 135; People v. Kraus, 147 Misc. 906; Haight v. City of Elmira, 42 N. Y. 391)

> "It is incumbent on the defendant to show that the facts bring the case within the provisions of Sec. 465 of the Code of Criminal Procedure, and that his substantial rights have been prejudiced by the misconduct of a juror or jurors about which the defendant complained." (People v. Kraus, supra)

It is also well settled law that jurors cannot by their affidavits, or testimony, even though these affidavits aver their misconduct outside of the jury room, impeach, attack, or discredit the verdict which they have in fact recorded and rendered. Much less can they do so by their unsworn statements presented through the affidavits of others. (People v. Sprague, 217 N. Y. 373, 384; Tartacower v. New York City Transit Authority, 9 Misc. 2d 606, 608; Fisch on New York Evidence, Sec. 305, pp. 305, 306; Richardson on Evidence, 8th Edition, Sec. 423)

The sound reasoning for this rule is set down as follows in Payne v. Burke, 236 App. Div. 525, 529; "The reason for this rule is founded on sound public policy. If jurors, after they have been discharged and have mingled with the public, were permitted to discredit the verdict which they had solemnly rendered in open Court, no verdict would be safe, and judgments would rest on a very uncertain foundation. The consequences of such practice would be most mischievous; it would open the door for tampering with jurors and would make it easy for a corrupt or dissatisfied juror to destroy the very verdict to which he had deliberately given his assent under the sanction of an oath. Jurors would constantly be importuned by dissatisfied litigants and pressed for affidavits upon which their verdict might be assailed. Every trial lawyer knows full well how easy it would be to find some complacent juror who would yield to such appeal. If such practice were countenanced few, if any, verdicts would survive, and there would be no end to litigation."

Since defendants have indicated no other means to substantiate their claims and since the evidence by which the defendants intend to establish their contentions is inadmissible as a matter of law, this motion must in all respects be denied.

Order entered accordingly.

The clerk of the Court is directed to mail a copy of the decision and order to the attorneys for the defendants.

PETER T. FARRELL
J. S. C.

APPENDIX B

Opinions of the New York State Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

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No. 501

THE PEOPLE &c.,

Respondent,

vs.

FRED DELUCIA and SALVATOR MONTELLA,

Appellants.

DYE, *J.*:

In this joint appeal by permission, the appellants contend that the affirmance in the court below of the trial court's order denying their motion to set aside the verdict and for a new trial amount to reversible error. The motion was based on an affidavit by defendant's trial counsel in which he referred to statements allegedly made to him by certain of the jurors shortly after the verdict had been rendered, to the effect that they had viewed the premises where the crime was allegedly committed for the purpose of more easily understanding the evidence. There is no allegation that the jurors involved met or spoke with anyone except

each other. The premises in question, at 120-20 Queens Boulevard in the Borough of Queens, are across the street and about one block away from the court house where the trial was held. It has long been familiar law that jurors may not impeach their own duly rendered verdict by statements or testimony averring their own misconduct within or without the jury room; much less can they do so by statements presented in the form of hearsay affidavits (*People* v. *Sprague,* 217 N. Y. 373; *Dalrymple* v. *Williams,* 63 N. Y. 361; Fisch on New York Evidence, § 305; Richardson on Evidence, 8th Ed., § 432). The rule is founded on sound public policy (*Payne* v. *Burke,* 236 App. Div. 525 followed and cited with approval in *McDonald* v. *Pless,* 238 U. S. 264) which the courts have applied to preclude a juror from testifying as to his own misconduct (cf. *Haight* v. *City of Elmira,* 42 App. Div. 391). Even though an unauthorized view of such premises is improper it is not, without more, such an impropriety as to require the granting of a new trial (*People* v. *Johnson,* 110 N. Y. 134; *People* v. *Klein,* 213 App. Div. 66; See 58 A L R 2d 1147). Absent any competent proof that the defendant was prejudiced in a substantial right affecting the verdict, the motion was properly denied (Code of Crim. Pro., § 465; cf. *People* v. *Kraus,* 147 Misc. 906).

Other assigned errors need not detain us. We are satisfied that the proof adduced was sufficient as matter of law to support the judgment of conviction of each defendant on both counts of the indictment. Nor do we find that any error was committed with respect to the arresting officer's testimony on identification from which it might be inferred that the defendant DeLucia had a prior criminal record.

The judgment of conviction should be affirmed.

DESMOND, *Ch. J.* (dissenting):

The catch-phrase "jurors may not impeach their verdict" does not dispose of the proof that these jurors, depriving defendant of a basic protective right, went on their own to the crime scene, investigated there to check on the officers' testimony and reported back to their fellow members of the jury, all without the knowledge of court or counsel. The rule prohibiting self-impeachment by jurors is stretched too far and in the wrong direction when it is used to validate such a transgression of fundamental fair trial rules.

The rule has been so applied on occasion in some lower courts (*Clum* v. *Smith*, 5 Hill 560; *Sindle* v. *761 Ninth Ave. Corp.*, 127 N. Y. S. 2d 258, affd. 283 App. Div. 939; *Tartacover* v. *Transit Authority*, 169 N. Y. S. 2d 695; also perhaps in *Haight* v. *City of Elmira*, 42 App. Div. 391, 395). There is no doubt, however, that the rule and its purposes primarily and reasonably relate to affidavits or statements by jurors describing jury room deliberations and methods of arriving at verdicts and error or misconduct or mistake in doing so (*Dalrymple* v. *Williams*, 63 N. Y. 361, 363; *Slater* v. *United Traction Co.*, 172 App. Div. 404, 405; *Stein* v. *New York*, 346 U. S. 156, 178). As Wigmore puts it (vol. 8, McNaughton revision, § 2349), the effort is to protect against the jurors being questioned after verdicts as to their methods of decision or their motives, beliefs, intentions or understandings. Wigmore points out (see §§ 2353-2354) that it is anomalous that in most States while the affidavits of jurors cannot be used to go behind the verdict itself, nonetheless an illegal view by jurors is a ground for setting aside a verdict (see Code Crim. Pro., § 465) if the fact be established by someone other than a juror. There is an interesting opinion by Justice Brennan in *State* v. *Kociolek*

(2 N. J. 92, 98-100) in which he reminds us that the early common law had none of these prohibitions and that when the rule against impeachment was adopted in England it expressed only a policy against post-trial questioning of jurors as to how they arrived at their verdict. As Justice Brennan shows, this policy does not reasonably apply to proof that jurors without authority went out and procured illegal evidence on which they acted.

Without destroying the rule where it properly applies we should hold that it does not apply to a situation like this where the investigation is not as to what happened in the jury room or why, but as to a fact (illegal view) which has always been considered to be a strong ground for setting aside a verdict (see Code Crim. Pro., § 465, *supra; People* v. *Gallo,* 149 N. Y. 106, 114 et seq.).

I would reverse and send the case back to the trial judge to hold a hearing to determine whether a new trial should be granted on proof that certain jurors visited and inspected the scene of the alleged crime.

* * * * *

Judgments affirmed. Opinion by Dye, *J.* All concur except Desmond, *Ch. J.*, who dissents in an opinion in which Fuld and Burke, *JJ.*, concur.

APPENDIX C

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

"Section 1. * * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *."

APPENDIX D

Code of Criminal Procedure Section 411

"View of premises, when ordered, and how conducted. When, in the opinion of the court, it is proper that the jury should review the place in which the crime is charged to have been committed, or in which any material fact occurred, it may order the jury to be conducted, in a body, under charge of proper officers, to the place, which must be shown to them by a judge of the court, or by a person appointed by the court for that purpose."

Code of Criminal Procedure Section 465

"In what cases granted. The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:

* * * * *

2. When the jury has received any evidence out of court, other than that resulting from a view, as provided in section four hundred and eleven;

3. When the jury * * * have been guilty of any misconduct by which a fair and due consideration of the case has been prevented;" * * *

APPENDIX E

Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding

RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 18, 1965.

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No. 501

THE PEOPLE &c.,

Respondent,

vs.

FRED DELUCIA and SALVATOR MONTELLA,

Appellants.

BE IT REMEMBERED, That on the 23rd day of December in the year of our Lord one thousand nine hundred and sixty-four, Fred DeLucia and Salvator Montella, the appellants in this cause, came here unto the Court of Appeals, by Evseroff, Newman & Sonenshine, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank D. O'Connor, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William Sonenshine, of counsel for the appellants, and by Mr. Harvey B. Ehrlich, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the

State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, and so forth.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York

COURT OF APPEALS

CLERK'S OFFICE

Albany, March 18, 1965

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk

(Seal)

No. D 13380

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

I, PAUL LIVOTI, Clerk of the County of Queens and Clerk of the Supreme Court and County Court in and for said County, the same being courts of record having a seal, DO HEREBY CERTIFY that I have compared the annexed with the original Order Affirming Judgment—Peo. of the State of New York vs. Fred DeLucia and Salvatore Montella filed or entered in my office April 26, 1965 and that the same is a true transcript thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court this day of May 25, 1965.

/s/ PAUL LIVOTI
Clerk

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

(Now Number 195, October Term, 1965)

FRED DE LUCIA and SALVATOR MONTELLA,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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FRED DE LUCIA and SALVATOR MONTELLA,

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—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to the petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York entered in the above-entitled case on March 18, 1965 (15 N.Y. 2d 294).

A. Statement

Petitioner seeks a writ of certiorari in order to review a judgment of the Court of Appeals of the State of New York entered on March 18, 1965 (15 N.Y. 2d 294).

On appeal to the Appellate Division of the Supreme Court in and for the Second Judicial Department of the State of New York the judgment and order appealed from were affirmed without opinion (21 A.D 2d 805).

Upon appeal to the Court of Appeals of the State of New York the judgment of the Appellate Division was affirmed

by a divided Court, four (4) Judges voting to affirm the judgment and order below and three (3) Judges dissenting. Said opinion is reported at 15 N.Y. 2d 294. Copies thereof are attached to this brief as Appendix B.

There were no other opinions written in connection with the case.

B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code §1257 (3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York (15 N.Y. 2d 294) made on March 18th, 1965 as aforesaid, and annexed hereto as Appendix E.

C. The Questions Presented for Review

1) Were petitioners deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they were deprived of a basic protective right to a fair trial where several jurors, in contravention of the New York State Code of Criminal Procedure, and acting without the knowledge or authority of the Court or counsel, went to the alleged scene of the crime, investigated there to check on the arresting officers' testimony, and reported their findings to the fellow members of the jury?

2) Were petitioners deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they were deprived of the basic protective right to a fair trial by being denied a hearing as to the alleged misconduct by the jurors who in contravention of the New York State Code of Criminal Procedure, and acting without the knowledge or authority of the Court or counsel, went to the alleged scene of the crime, investigated there to check on the arresting officers' testimony, and reported their findings to the fellow members of the jury?

D. Constitutional Provision and Statute Involved

The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution. The statutes involved are §465 and §411 of the Code of Criminal Procedure of the State of New York.

Each of the foregoing is set forth verbatim in Appendices C and D respectively of this petition.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioners were indicted by a Grand Jury in Kings County in the State of New York for the crimes of attempted burglary in the third degree and possession of burglar's instruments. They were tried in the Supreme Court of the State of New York, Queens County, upon said indictment, before Honorable Peter T. Farrell, a Justice

of said Court, and a jury. They were convicted as charged in the indictment by the verdict of a jury after trial. Subsequent to the jury verdict, an application was made by the attorney for the petitioners for a new trial. The basis of the application were statements made by the attorney for the petitioners of conversations he had with members of the jury, and the attorney stated that several of the jurors had informed him that they had visited the scene of the crime the night before the case was submitted to them for deliberation, and that the visit was without knowledge or authority of the Court or counsel. This motion was denied on June 12, 1963 by Mr. Justice Farrell, and the opinion is appended hereto as Appendix A.

The motion was denied on the grounds that:

(1) An unauthorized visit to the place of the crime will not require a new trial if the jurors were not guilty of misconduct while there and if they could not have acquired any improper information that might have influenced their verdict.

(2) That jurors cannot impeach their verdict and even more so they cannot do it by the unsworn statement of others.

An appeal was then taken to the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department from this order. While the trial proceeded and application was made for re-argument and in the re-argument the petitioners submitted affidavits from five of the twelve jurors. This motion for re-argument was granted and upon the re-argument the Court adhered to its original decision of June 13, 1963.

The Appellate Division affirmed the conviction without opinion. The Court of Appeals affirmed the conviction and the opinions of the Court are set forth in Appendix B.

Statement of Pertinent Facts

JOHN FRANCIS MCGUIRE testified that he and Norton Peppis ran a restaurant and night club at 120-20 Queens Boulevard, in Queens, known as Pep-McGuire's (20-21, 35). He closed the restaurant at about 4:30 A.M. on Monday morning, May 14th and had checked and locked the windows and the two doors (22) and when he returned later in the morning, the doors were locked, but the metal rear exit door was loose at the bottom, leaving an open space of an inch and a half (23-24, 40, 49). This condition was not so when he had left that morning (26). There were also markings and indentations on the door and sash (26-27, 42). He had used that door, but never saw the indentations before (43, 154). He did not give the defendants permission to enter the premises (27). The rear door opened into a stairway which opened on to a pathway which led from Queens Boulevard to the stairway door and then to the next street (31-32, 41-42).

DET. JOSEPH SZARWAS testified that he was in the vicinity of 120-20 Queens Boulevard at about 5:30 A.M. on May 14, 1962. He observed the defendants riding in a 1956 Cadillac. The car slowed near Pep-McGuire's and then continued (66-67, 185, 187). The detective watched the alleyway and ten minutes later saw the defendants in the alleyway going towards Queens Boulevard from the next street (68, 190) and then saw the defendant Montella open the building side door and both defendants entered the building (70-71, 191-

192). The detective and his brother officers, Detective Goggin and Lt. Lester, moved towards the door. Szarwas saw DeLucia inside looking out. Szarwas opened the door, told the defendant, DeLucia to stay there, and went up the stairs to a landing where Montella stood with a screw driver jammed between the restaurant door and the door frame. Montella pulled the screw driver out and dropped it at his feet, from where Szarwas picked it up. The officer searched Montella and found a flashlight in his left outer coat pocket (72, 90, 199, 201-203, 208). The bottom of the door was pulled out from the jamb and there were about fifteen or twenty sharp edged indentations in the jamb and the door (92). At the indentations, the paint was chipped away and orange paint showed (92, 93). Szarwas asked Montella for his car keys and Montella said he had no keys and had no match. The Cadillac was located about a block away, the keys were under the driver's seat and Montella's identification was found in a wallet in the glove compartment (94, 121). The detective identified the screw driver as a burglar's tool (96, 213, 218-219). The police laboratory report was marked defendants' Exhibit C. It stated that an examination of the foot end of the screw driver disclosed green, gold, maroon and orange paint. The door was painted green and had layers of gold, maroon and orange which was microscopically similar to the paint on the screw driver (165). Based on physical measurements, the tool marks on the door would have been caused by the screw driver, but there were insufficient microscopic comparative points to make a determination (165).

(In the absence of the jury, DeLucia admitted a prior conviction upon his arraignment on a prior Offense Information (100)).

Detective Francis J. Goggin testified that at the time and place he was with Lt. Lester and Detective Szarwas and followed Detective Szarwas into the alleyway and doorway and saw defendant DeLucia at the inside of the door and saw Detective Szarwas on the landing with Montella (238-239, 249-250-254). DeLucia said to him, "The only thing you got us for is loitering" (240, 258). Goggin heard something drop and then saw Szarwas pick up a screw driver from the floor at the landing (255-256).

Lt. Edward J. Lester testified that after both defendants and Detective Goggin were in his car, DeLucia said, "Can't we straighten this thing out?" and Montella said, "Isn't there something we can do about this?" (276-278)

Norton Peppis testified for the defense. He was a part owner of Pep-McGuire's restaurant. During the night of May 13-14, the bandleader introduced him to the defendants and two girls who were in the restaurant (286-287). The following morning he entered the restaurant through the front door and opened the padlock on the back door (292). The back door was loose and old and there were marks on it from before and he couldn't tell the difference (294, 296-297, 317, 323).

Andrew Senatore testified that he was the Pep-McGuire bandleader. The defendants and two girls came in at about 11:30 P.M. and he said good night to them when he left at 3:00 A.M. (326-328).

Kathleen Levisenkoff testified that she and another girl met the defendants at a cocktail lounge at 10:00 P.M. Then she and her girl friend left in her car and went to Pep-McGuire's where they met the defendants again (330-332). They stayed there until 4:00 A.M. and then went in her car

to a diner where they stayed for an hour. She then dropped off both defendants in front of Pep-McGuire's. The defendants had a black Cadillac (334, 336).

The defendant Montella testified in his own defense. He was never convicted of a crime, he never touched the rear door and he didn't own the screw driver (338). He had been at Pep-McGuire's for four and a half hours until closing time and then went to a diner and left the diner close to 5:30 A.M. He had parked his sister's 1956 Cadillac about a block away from Pep-McGuire's and then walked through the alleyway from Kew Gardens Roads to Queens Boulevard and had met the girls in front of Pep-McGuire's (339-341). The girl was to take them to their car but continued on Queens Boulevard. They got out of the car and started through the alleyway to get to their car when the detectives approached from the front and from the back and shoved them into the hallway (342-343). At first he said the screw driver was in the detective's hand (343), but then said that he did not see the screw driver until it was at his feet at a point a foot or two past the outer door. He did not see anyone put the screw driver there (358-360). The flashlight was in the glove compartment of his sister's car (345). The sister lived in Staten Island. He had her auto on Friday, Saturday and Sunday. Before he went to Pep-McGuire's he left the keys under the mat and the wallet in the car's glove compartment (348-349). He did not tell the detectives what kind of a car he had or where he had parked it (363). Shown a photo of the alley, he could not point out there where one could see from the alleyway to the other street (351-353).

POINT I

There has been no violation of any provision of the Constitution of the United States.

It is submitted as set forth in *Herbert* v. *Louisiana,* 272 U.S. 312, 316-317.

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires: nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'. Those principles are applicable alike in all the states and do not depend upon or vary with local legislation." *Herbert* v. *Louisiana,* 272 U.S. 312, 316-317.

This Court has never attempted to define with precision the words "due process of law", nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. *Holden* v. *Hardy,* 169 U.S. 366, 389-390.

The foregoing statements were referred to with approval in *Powell* v. *Alabama, supra,* at pp. 67, 71-72. The present case, on the other hand, illustrates equally well the kind of judgments by a state court that should not be invalidated as lacking in the due process of law required by the Fourteenth

Amendment. This is so, although the procedure followed, in 1938, by the state court in the instant cases, as to counsel for the accused might not have satisfied the practice then required of a federal court in the case of comparable federal crimes. The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the federal process of law as prescribed for the federal courts in comparable federal cases. It says merely "nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ." This due process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover any varieties of processes that are expressive of differing combinations of historical or modern, local or other judicial standards, provided they do not conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . ." *Herbert* v. *Louisiana, supra,* at p. 316. This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their own control over the procedure to be followed in criminal trials in their respective courts. It recognizes that differences arise naturally between the procedures in the state courts and those in the federal courts. *Bute* v. *Illinois,* 333 U.S. 640, 648-50.

The state may regulate the procedure of its courts in accord with its own conceptions of justice, unless in doing so it violates basic dictates of due process of law. *Brown* v. *Mississippi,* 297 U.S. 278. The exact meaning and scope of

the phrase due process of law has never been decided with precision but requires an orderly procedure adapted to the nature of the case including the opportunity to be heard and offer a defense or explanation at a hearing or trial. However, no particular type of form or method of state procedure is mandated. *In re Coates,* 9 N.Y. 2d 242, appeal dismissed, 368 U.S. 34; *Lyons* v. *Goldstein,* 290 N.Y. 19; *Schwartz' Estate* v. *Dunishtock,* 175 Misc. 860; *People* v. *Berkowitz,* 14 M. 2d 384, affirmed 7 A.D. 2d 1031.

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation but is unfixed and based upon considerations of time, history, reason, and past course of decisions. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy,* 367 U.S. 886, 81 S. Ct. 1743.

The Court of Appeals has effectively ruled in the case at bar that there has been no violation of any right of defendant. That there is an overriding concept that jurors may not impeach their own duly rendered verdict and that these particular defendants, the petitioners herein were not prejudiced in a substantial right affecting the verdict. A fair trial was afforded the petitioners; they received able representation; and they were not in any way prejudiced by the actions of the Court nor by any purported misconduct of the jury.

Under the doctrine that a state may regulate procedures of its own criminal proceedings in keeping with its own sense of justice and fairness it cannot be said that petitioner received anything but a fair trial free from error of constitutional magnitude.

POINT II

The issues were not properly raised or preserved.

Respondent submits that the petitioners objected to the verdict of the jury on the grounds that it violated sections 411 and 465 of the Code of Criminal Procedure of the State of New York. It is submitted that as is evidenced by the record herein the issue of denial of due process of the 14th Amendment of the United States Constitution was not raised upon a motion for a new trial, nor upon motion for re-argument of the order denying them their motion for a new trial. It is further submitted, that, as the record will demonstrate, the issue of denial of due process and the issue of violation of the 14th Amendment were not specifically raised in the Appellate Dvision nor in the Court of Appeals. The sole attack throughout is the question of whether or not there has been a violation of the particular statutes involved.

CONCLUSION

The writ of ceriorari prayed for should be denied.

Dated: Queens, N.Y.
July , 1965

Respectfully submitted,

FRANK D. O'CONNOR
Attorney for Respondents

BENJ. J. JACOBSON
Member of the Bar of
the Supreme Court of the United States
of Counsel

EUGENE FELDMAN

APPENDIX A

Opinion of the Trial Justice

SUPREME COURT

QUEENS COUNTY

CRIMINAL TERM, PART I

By

PETER T. FARRELL, *J.*

Dated June 13th, 1963

122-63 superseding Ind. No. 878-62

THE PEOPLE OF THE STATE OF NEW YORK

—against—

FRED DE LUCIA
SALVATORE MONTELLA

Defendants.

This is a motion by the defendants for an order setting aside the verdict of guilty and granting a new trial to the defendants upon the ground that the jury violated Sec. 465, subd. 2 and 3, of the Code of Criminal Procedure.

Defendants were convicted on May 2, 1963 by the verdict of a jury of the crimes of Attempted Burglary in the Third Degree and Possession of Burglars Instruments as a Felony as to De Lucia, and Attempted Burglary in the Third Degree and Possession of Burglars Instruments as a Misdemeanor as to Montella.

Appendix A—Opinion of the Trial Justice

The defendants allege, in substance, that during the trial and without direction of the Court, pursuant to Sec. 411 of the Code of Criminal Procedure, the jury visited the scene of the alleged crime and conducted thereat their own experiments in receiving and evaluating evidence.

Defendants by their affidavits submitted in support of this motion and by oral argument in open Court base their allegations only upon information and statements of jurors who rendered judgment in this matter.

It is well established law that the fact that the jury made an unauthorized visit to the place of the crime will not require a new trial, if they were not guilty of misconduct while there, and could not have acquired any improper information that might have influenced their verdict. (24 C.J.S. Criminal Law, Sec. 1449(14) p. 135; People v. Kraus, 147 Misc. 906; Haight v. City of Elmira, 42 N.Y. 391)

> "It is incumbent on the defendant to show that the facts bring the case within the provisions of Sec. 465 of the Code of Criminal Procedure, and that his substantial rights have been prejudiced by the misconduct of a juror or jurors about which the defendant complained." (People v. Kraus, supra)

It is also well settled law that jurors cannot by their affidavits, or testimony, even though these affidavits aver their misconduct outside of the jury room, impeach, attack, or discredit the verdict which they have in fact recorded and rendered. Much less can they do so by their unsworn statements presented through the affidavits of others. (People v. Sprague, 217 N.Y. 373, 384; Tartacower v. New York City Transit Authority, 9 Misc. 2d 606, 608; Fisch on New York

Evidence, Sec. 305, pp. 305, 306; Richardson on Evidence, 8th Edition, Sec. 423)

The sound reasoning for this rule is set down as follows in Payne v. Burke, 236 App. Div. 525, 529; "The reason for this rule is founded on sound public policy. If jurors, after they have been discharged and have mingled with the public, were permitted to discredit the verdict which they had solemnly rendered in open Court, no verdict would be safe, and judgments would rest on a very uncertain foundation. The consequences of such practice would be most mischievous; it would open the door for tampering with jurors and would make it easy for a corrupt or dissatisfied juror to destroy the very verdict to which he had deliberately given his assent under the sanction of an oath. Jurors would constantly be importuned by dissatisfied litigants and pressed for affidavits upon which their verdict might be assailed. Every trial lawyer knows full well how easy it would be to find some complacent juror who would yield to such appeal. If such practice were countenanced few, if any, verdicts would survive, and there would be no end to litigation."

Since defendants have indicated no other means to substantiate their claims and since the evidence by which the defendants intend to establish their contentions is inadmissible as a matter of law, this motion must in all respects be denied.

Order entered accordingly.

The clerk of the Court is directed to mail a copy of the decision and order to the attorneys for the defendants.

PETER T FARRELL

J. S. C.

APPENDIX B

Opinions of the New York State Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

2

No. 501

THE PEOPLE &c.,

Respondent,

vs.

FRED DELUCIA and SALVATOR MONTELLA,

Appellants.

DYE, J.:

In this joint appeal by permission, the appellants contend that the affirmance in the court below of the trial court's order denying their motion to set aside the verdict and for a new trial amount to reversible error. The motion was based on an affidavit by defendant's trial counsel in which he referred to statements allegedly made to him by certain of the jurors shortly after the verdict had been rendered, to the effect that they had viewed the premises where the crime was allegedly committed for the purpose of more easily understanding the evidence. There is no allegation that the jurors involved met or spoke with anyone except each other. The premises in question, at 120-20 Queens Boulevard in the Borough of Queens, are across the street

and about one block away from the court house where the trial was held. It has long been familiar law that jurors may not impeach their own duly rendered verdict by statements or testimony averring their own misconduct within or without the jury room; much less can they do so by statements presented in the form of hearsay affidavits (*People* v. *Sprague,* 217 N. Y. 373; *Dalrymple* v. *Williams,* 63 N. Y. 361; Fisch on New York Evidence, § 305; Richardson on Evidence, 8th Ed., § 432). The rule is founded on sound public policy (*Payne* v. *Burke,* 236 App. Div. 525 followed and cited with approval in *McDonald* v. *Pless,* 238 U. S. 264) which the courts have applied to preclude a juror from testifying as to his own misconduct (cf. *Haight* v. *City of Elmira,* 42 App. Div. 391). Even though an unauthorized view of such premises is improper it is not, without more, such an impropriety as to require the granting of a new trial (*People* v. *Johnson,* 110 N. Y. 134; *People* v. *Klein,* 213 App. Div. 66; See 58 A L R 2d 1147). Absent any competent proof that the defendant was prejudiced in a substantial right affecting the verdict, the motion was properly denied (Code of Crim. Pro., § 465; cf. *People* v. *Kraus,* 147 Misc. 906).

Other assigned errors need not detain us. We are satisfied that the proof adduced was sufficient as matter of law to support the judgment of conviction of each defendant on both counts of the indictment. Nor do we find that any error was committed with respect to the arresting officer's testimony on identification from which it might be inferred that the defendant DeLucia had a prior criminal record.

The judgment of conviction should be affirmed.

Appendix B—Opinions of the New York State Court of Appeals

DESMOND, Ch. J. (dissenting):

The catch-phrase "jurors may not impeach their verdict" does not dispose of the proof that these jurors, depriving defendant of a basic protective right, went on their own to the crime scene, investigated there to check on the officers' testimony and reported back to their fellow members of the jury, all without the knowledge of court or counsel. The rule prohibiting self-impeachment by jurors is stretched too far and in the wrong direction when it is used to validate such a transgression of fundamental fair trial rules.

The rule has been so applied on occasion in some lower courts (*Clum* v. *Smith*, 5 Hill 560; *Sindle* v. *761 Ninth Ave. Corp.*, 127 N. Y. S. 2d 258, affd. 283 App. Div. 939; *Tartacover* v. *Transit Authority*, 169 N. Y. S. 2d 695; also perhaps in *Haight* v. *City of Elmira*, 42 App. Div. 391, 395). There is no doubt, however, that the rule and its purposes primarily and reasonably relate to affidavits or statements by jurors describing jury room deliberations and methods of arriving at verdicts and error or misconduct or mistake in doing so (*Dalrymple* v. *Williams*, 63 N. Y. 361, 363; *Slater* v. *United Traction Co.*, 172 App. Div. 404, 405; *Stein* v. *New York*, 346 U. S. 156, 178). As Wigmore puts it (vol. 8, McNaughton revision, § 2349), the effort is to protect against the jurors being questioned after verdicts as to their methods of decision or their motives, beliefs, intentions or understandings. Wigmore points out (see §§ 2353-2354). that it is anomalous that in most States while the affidavits of jurors cannot be used to go behind the verdict itself, nonetheless an illegal view by jurors is a ground for setting

aside a verdict (see Code Crim. Pro., § 465) if the fact be established by someone other than a juror. There is an interesting opinion by Justice Brennan in *State* v. *Kociolek* (20 N. J. 92, 98-100) in which he reminds us that the early common law had none of these prohibitions and that when the rule against impeachment was adopted in England it expressed only a policy against post-trial questioning of jurors as to how they arrived at their verdict. As Justice Brennan shows, this policy does not reasonably apply to proof that jurors without authority went out and procured illegal evidence on which they acted.

Without destroying the rule where it properly applies we should hold that it does not apply to a situation like this where the investigation is not as to what happened in the jury room or why, but as to a fact (illegal view) which has always been considered to be a strong ground for setting aside a verdict (see Code Crim. Pro., § 465, *supra; People* v. *Gallo*, 149 N. Y. 106, 114 et seq.).

I would reverse and send the case back to the trial judge to hold a hearing to determine whether a new trial should be granted on proof that certain jurors visited and inspected the scene of the alleged crime.

* * * * *

Judgments affirmed. Opinion by Dye, *J.* All concur except Desmond, *Ch. J.*, who dissents in an opinion in which Fuld and Burke, *JJ.*, concur.

APPENDIX C

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

"Section 1. * * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *."

APPENDIX D

CODE OF CRIMINAL PROCEDURE SECTION 411

"View of premises, when ordered, and how conducted. When, in the opinion of the court, it is proper that the jury should review the place in which the crime is charged to have been committed, or in which any material fact occurred, it may order the jury to be conducted, in a body, under charge of proper officers, to the place, which must be shown to them by a judge of the court, or by a person appointed by the court for that purpose."

CODE OF CRIMINAL PROCEDURE SECTION 465

"In what cases granted. The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:

* * * * *

2. When the jury has received evidence out of court, other than that resulting from a view, as provided in section four hundred and eleven;

3. When the jury * * * have been guilty of any misconduct by which a fair and due consideration of the case has been prevented;" * * *

APPENDIX E

Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding

RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 18, 1965.

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No. 501

THE PEOPLE &c.,

Respondent,

vs.

FRED DELUCIA and SALVATOR MONTELLA,

Appellants.

Appendix E—Judgment of the Court of Appeals

BE IT REMEMBERED, That on the 23rd day of December in the year of our Lord one thousand nine hundred and sixty-four, Fred DeLucia and Salvator Montella, the appellants in this cause, came here unto the Court of Appeals, by Evseroff, Newman & Sonenshine, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank D. O'Connor, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William Sonenshine, of counsel for the appellants, and by Mr. Harvey B. Ehrlich, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said

Appendix E—Judgment of the Court of Appeals

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, and so forth.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals of the State of New York

Appendix E—Judgment of the Court of Appeals

COURT OF APPEALS

CLERK'S OFFICE

Albany, March 18, 1965

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk

(Seal)

No. D 13380

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

I, PAUL LIVOTI, Clerk of the County of Queens and Clerk of the Supreme Court and County Court in and for said County, the same being courts of record having a seal, DO HEREBY CERTIFY that I have compared the annexed with the original Order Affirming Judgment—Peo. of the State of New York vs. Fred DeLucia and Salvatore Montella filed or entered in my office April 26, 1965 and that the same is a true transcript thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court this day of May 25, 1965.

/s/ PAUL LIVOTI
Clerk